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OCTOBER TERM, 1957

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MILLS MILL, DRAPER CORPORATION AND THE POWELL KNITTING COMPANY, INDIVIDUALLY AND ON BEHALF OF ALL OF THE TAXPAYERS IN UNA WATER DISTRICT WHO MAY CARE TO COME IN, CONTRIBUTE TO THE COSTS HEREOF AND PARTICIPATE IN THIS ACTION, APPELLANTS,

versus

ERNEST E. HAWKINS, B. R. WEST AND J. T. NORTON, INDIVIDUALLY AND CONSTITUTING THE UNA WATER DISTRICT COMMISSION, APPELLEES.

ON APPEAL FROM THE SUPREME COURT OF SOUTH CAROLINA

JURISDICTIONAL STATEMENT

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JURISDICTIONAL STATEMENT

Appellants appeal from the Judgment of the Supreme Court of South Carolina entered on June 19, 1957, which, by a divided Court, affirmed the results of an Order of the Court of Common Pleas for Spartanburg County, and submit this Statement to show that the Supreme Court of the United States has jurisdiction of the appeal and that a substantial Federal question is presented.

OPINIONS BELOW

The majority and minority opinions of the Supreme Court of South Carolina are reported in Westbrook's Advance Sheets, dated June 22, 1957. They are not yet reported in the S. C. and S. E. 2d Reports. Copies of the majority and minority opinions are attached hereto as Ap-

pendix A. The Order of the Court of Common Pleas of Spartanburg County is not reported. It is attached hereto as Appendix B.

JURISDICTION

This suit was brought to have declared unconstitutional that Act of the General Assembly of South Carolina purportedly creating Una Water District (Act No. 582 of the Acts of the General Assembly of the State of South Carolina, 1955, 49 Statutes at Large of South Carolina, page 1400 *et seq.*) and to enjoin the appointed Commissioners thereof from issuing any general obligation bonds. The majority and minority opinions of the Supreme Court of South Carolina were filed on June 19, 1957. Appellants' Petition for Rehearing was denied by Order entered August 6, 1957, with two members of the Court dissenting. Notice of Appeal was filed with the Clerk of the Supreme Court of South Carolina on October 18, 1957.

The jurisdiction of the Supreme Court to review the opinions of the Supreme Court of South Carolina is conferred by Section 1257 (2) of Title 28, United States Code. The following decisions sustain the jurisdiction of the Supreme Court to review the Judgment of the Supreme Court of South Carolina: *Demorest v. City Bank Farmers Trust Company,* 321 U. S. 36, 88 L. Ed. 526; *Nashville, C. & St. L. R. Co. v. Walters,* 294 U. S. 405, 79 L. Ed. 329; *Dahnke-Walker Milling Co. v. Bondurant,* 257 U. S. 282, 66 L. Ed. 239; *Myles Salt Co. v. Board of Commissioners,* 239 U. S. 478, 60 L. Ed. 329.

STATUTES INVOLVED

49 Statutes at Large (of South Carolina), page 1400 *et seq.* is set forth in Appendix C hereto. 38 Statutes at Large (of South Carolina), pages 1292 *et seq.*, now Sections 59-601 through 59-625, Code of Laws of South Carolina, 1952. This Act is set forth in Appendix D hereto.

QUESTION PRESENTED

Does not Act No. 582 of the Acts of the General Assembly of the State of South Carolina, 1955, 49 Statutes at Large, Page 1400 *et seq.*, and its application deprive these Appellants and all others similarly situated of property without due process of law in violation of the Fifth and Fourteenth Amendments to the Constitution of the United States and deny to them the equal protection of the laws in violation of the Fourteenth Amendment to the Constitution of the United States?

STATEMENT OF THE CASE

In 1934 the General Assembly of South Carolina passed and the Governor approved an Act providing the means for creating any area which does not include any incorporated city or town or part thereof into an electric light, water, fire protection and/or sewerage district. The Act further provided for the government of any such district so created, its financing, etc. This Act is officially published in 38 Statutes at Large at page 1292, *et seq.* It is now codified as Sections 59-601 through 59-625 in the 1952 Code of Laws of South Carolina. This Act will hereinafter be referred to as the General Law.

In 1955 the General Assembly of South Carolina passed and the Governor approved an Act purportedly creating by legislative fiat an area (in Spartanburg County) which does not include any incorporated city or town or part thereof into the Una Water District. This Act is officially published in 49 Statutes at Large at page 1400 *et seq.* Hereinafter it will be referred to as the Special Act.

The two Acts are very similar in many respects. The General Law provides that any district created shall be governed by three commissioners. The Special Act provides that the Una Water District shall be governed by three commissioners. The General law grants to the commis-

sioners of any district created thereunder the power of condemnation, the power to establish rates, the power to issue general obligation bonds upon approval of the electorate and the power to issue revenue bonds. The Special Act gives the same powers to the Commissioners of the Una Water District. Both the General Law and the Special Act provide for the levying of taxes to retire general obligation bonds.

But there are material and vital differences between the two Acts. The General Law provides that before any district is formed there shall be filed with the Clerk of the Court of the County in which such district is proposed to be located a written petition signed by a majority of the resident land owners in the proposed district or by the owners of more than half the land in acreage which will be affected by or assessed for the expense of the proposed improvements. It further provides that when any such petition is approved by the Clerk of Court the Clerk shall call an election of the qualified voters of the district to vote upon the establishment of the district. It further provides that the commissioners who are to govern such district shall be elected by the qualified electors of the district. It further provides that no rates shall be established until after a public hearing at which all users of the works and the owners of property served or to be served thereby shall have the opportunity to be heard. Such rights granted to the freeholders, qualified electors and residents of all areas of this State outside of incorporated municipalities are denied by the Special Act to the freeholders, qualified electors and residents of the area comprising the Una Water District. The Special Act creates by legislative fiat into the Una Water District an area of approximately three square miles adjacent and adjoining to the City of Spartanburg at its Northwest perimeter. The freeholders thereof are denied the right of petition and the right to determine the boundaries of the District. The qualified electors within

the area of the District are deprived of the right to vote upon the question of establishing the District, including approval or disapproval of the area proposed. The Special Act provides that the Commissioners of the District shall be appointed by the Governor upon the recommendation of a majority of the legislative delegation from Spartanburg County, thereby depriving the qualified electors from electing the governing body. The Special Act provides that the Commissioners of the District may fix the rates to be charged without any public hearing thereon, thereby depriving the freeholders and residents of the area of the right to be heard upon the question of the rates to be charged. The Special Act further provides that the Commissioners by regulation may require any person within the District to use any water system and/or sewer system constructed by the Commissioners.

The Commissioners of the District propose, in the event the Special Act is not held unconstitutional, to issue $500,000.00 of general obligation bonds for the construction of new water and sewer mains.

The main line of the Southern Railway, running East and West, bisects the District into two approximately equal areas. In the Southern one-half are located the textile plants of the Appellants Mills Mill and The Powell Knitting Company, and the textile machinery warehouse plant of the Appellant Draper Corporation. Each of the Appellants at its own expense and cost some time ago installed a water system and a sewer system, which systems are now in operation and which facilities adequately serve the plants of these Appellants and the communities surrounding such plants. The community surrounding the plants of each Appellant is composed primarily of residences, practically all of which residences are owned and occupied by employees of that Appellant. Each of these water and sewer systems is served

by water from the Spartanburg Water Works, the same water works which serves the City of Spartanburg.

In addition to the facilities installed by these Appellants a number of other water and sewer lines have been laid and are in existence and operation in the District, especially in the Southern one-half. (Outside City Location Map, Spartanburg Water Works, Plaintiff's Exhibit 9.) At present the Spartanburg Water Works is now serving in addition to the plants of these Appellants 490 of the 514 other buildings located in the Southern one-half. Only 24 buildings in the Southern one-half, all or practically all of which are small residences, are not being served by the Spartanburg Water Works.

According to the undisputed testimony of the Superintendent of the Spartanburg Water Works there are at present adequate water facilities available to the Southern one-half of the District. No problem of health or sanitation exists in this Southern one-half of the District. In the entire area comprising the District water and sewerage facilities are inadequate in only two small sections thereof, to wit, Una and Johnson City, both small unincorporated communities located in the Northern one-half of the District. The Una community is located in the Southeastern corner of the Northern one-half and the Johnson City community is located in the West central portion of the Northern one-half.

The total assessed valuations for tax purposes of all property within the area comprising the District is approximately $1,150,000.00. Of this amount $267,000.00 is on the properties of Mills Mill, $83,390.00 is on the properties of Draper Corporation, and $80,000.00 is on the properties of The Powell Knitting Company; $430,380.00, 37.4 percent of the total. Of the total assessed valuation approximately $223,390.00, 19.4 percent, is on the lines, poles, tracks and rights of ways of Duke Power Co., Southern Bell Telephone

& Telegraph Company, A & S Railroad, A & CAL Railroad and P & N. Railroad. None of these last named companies has any properties within the District other than said lines, poles, tracks and rights of ways. In the event the proposed bond issue is issued these Appellants will be required to pay 37.4 percent of the tax levied to retire the bonds and these Appellants and the other named companies will be required to pay 56.8 percent of the tax levied to retire such bonds.

The undisputed testimony is that the minimum average annual cost of retiring the proposed bond issue will be from $34,750.00 to $38,000.00 for 20 years, the exact average annual cost depending upon the interest rate at which the bonds sold. (This testimony was given in December, 1955. There can be little doubt that with the material increase in interest rates since that time the cost of retirement would be considerably higher.) Such minimum average annual cost of retiring the proposed bond issue would require a minimum average annual tax levy of from 30 to 34 mills for 20 years. Assuming the lower levy, the total tax assessment on these Appellants will be $258,228.00, 60 percent of the assessed valuations of their properties, and the total tax assessment on the properties of the foregoing named utilities and railroads will be $133,000.00, 60 percent of the assessed valuations of their properties. If the bonds should be a 30-year issue, the cost of retiring and the tax to retire will be greater.

No benefit, direct or indirect, result or can result to the properties of these Appellants from the Special Act and its application. The possible benefits alleged by the Respondents are speculative and conjectural, and even such speculative benefits are so remote and minute as to fade into insignificance when viewed in the light of the confiscatory tax burden which would be placed on these Appellants. Yet these Appellants and the named utilities and railroads

would be required to pay 56.8 percent of the cost of the proposed water and sewer systems; these Appellants would be required to pay 37.4 percent of such cost; and Mills Mill alone would be required to pay 23.2 percent, all for the benefit of the few in the Una and Johnson City communities. (It is not amiss to here state that water mains and sewer mains are now located in or near each of these two small communities and available to their residents. It is to be noted, too, that a substantial number of residents of the Una community have already taken advantage of the 14-inch and 12-inch water mains which run directly through that community and are served by water from the Spartanburg Water Works. The cost of the remaining residents of these two communities making use of such available water and sewer mains would be a fraction of that proposed to be expended.) That benefit to the properties of these Appellants is speculative and remote is tacitly recognized by the majority opinion of the Supreme Court of South Carolina, wherein only two possible benefits are mentioned and in which it is stated that such possible benefits "may" result.

If under the provisions of the Special Act the Commissioners should see fit to acquire the water and sewer systems of the Appellants, the Appellants would themselves pay, in taxes, 37.4 percent of the compensation due them in the transaction. If such systems should not be so acquired, Appellants may effectually be deprived of them and their value without compensation, for Subsection 6 of Section 3 of the Special Act empowers the Commissioners to "prescribe regulations requiring persons who shall be residents of the District to make use of any water or sewer system which the District shall place in operation."

That the Special Act and is application deprive these Appellants of due process of law and deny to them the equal protection of the laws in violation of the Constitu-

tion of the United States was expressly alleged in the Complaint of these Appellants by which this action was commenced. Denial by the Respondents in their Answer created the issue. The Trial Judge held adverse to the Appellants. The issue was preserved by the grounds of appeal to the Supreme Court of South Carolina. The majority opinion of the Supreme Court of South Carolina held adverse to Appellants on the ground that the Appellants have not successfully rebutted (emphasis and parenthetical inserts in the following quotation are Appellants') "the presumption that their properties will be benefited. Their plants are near certain areas in the district known as the Una and Johnson City communities. The undisputed testimony shows that unsanitary conditions are prevalent in these two communities and constitute a health menace." (The testimony does not show that unsanitary conditions are prevalent in these two communities. Nor does it show the existence of any health menace. It does indicate that there are some situations in these two communities which under certain possibilities could become unsanitary. Any unsanitary situation which might develop could be corrected by the property owner involved, and if he did not do so could be abated, at no cost to the taxpayers, under existing law of South Carolina, to wit, Section 32-1 *et seq.*, Code of Laws of South Carolina, 1952, and Act No. 870 of the Acts of 1952, 1952 Statutes at Large of South Carolina, 2134, and the regulations adopted pursuant thereto and authorized thereunder. See particularly the State Board of Health's Rules and Regulations on "Nuisances—Defined" and "Pit Privies" appearing on page 620 of Vol. 7 of Code of Laws of South Carolina, 1952, and on "Septic Tanks" appearing on page 644 of said Vol. 7 of said Code. That the South Carolina State Board of Health and the Spartanburg County Board of Health have taken no action is persuasively indicative that no present or potential health menace exists

in either of these two communities.) "The danger does not always stop at the boundaries of such areas but may extend to the entire neighborhood." (*I. e.*: how far a fly with a tail wind may fly; a second fly with a tail wind may fly; and so on.) "When these unsanitary conditions are removed, it **may** result in the improvement of public health throughout the district." (and on infinititum.) "It further appears that several of the Appellants have considerable undeveloped acreage surrounding their plants which may be benefited by the installation of a publicly operated water and sewer system. It is well known as pointed out in *Floyd v. Parker Water & Sewer System District, supra,* 203 S. C. 276, 17 S. E. (2d) 233, that the installation of water and sewer facilities generally results in considerable enhancement of property values." (The Court overlooked that it was an undisputed fact, stipulated by the parties, that all lands of the Appellants are adequately served by existing and entirely adequate water and sewer systems.) "A further consideration is the fact that corporate authorities in the district are authorized to provide for garbage disposal, **a facility not previously enjoyed by anyone in the district.**" (As is clearly shown in the Petition for Rehearing, the special Act makes no findings in regard to this and there is no testimony in the record thereabout. In truth, a substantial portion, if not all, of the residences and the buildings of the southern one-half of the district are now, and have been for some time, served by private or commercial garbage disposal organizations.) As so ably stated by Mr. Justice Legge, writer of the minority opinion: "I confess my inability to perceive, in this situation, any reasonable prospect of benefit to the Appellants' properties. On the contrary, it seems obvious to me that inclusion, in the proposed district, of the area lying south of the Southern Railway main line was for the benefit not of that area, but of the two small communities north of the rail-

road, to which reference has been made. *Myles Salt Co. v. Board of Commissioners, supra,* was decided on the pleadings, and the act there involved was one creating a drainage district; but the following language of the opinion in that case is applicable here:

> "'It is to be remembered that a drainage district has the special purpose of the improvement of particular property, and when it is so formed to include property which is not and cannot be benefited directly or indirectly, including it only that it may pay for the benefit to other property, there is an abuse of power and an act of confiscation. *Phillip Wagner v. Leser, supra* (239 U. S. 207, 36 S. Ct. 66, 60 L. Ed. 230). We are not dealing with motives alone, but as well with their resultant action; we are not dealing with disputable grounds of discretion or disputable degrees of benefit, but with an exercise of power determined by considerations not of the improvement of plaintiff's property, but solely of the improvement of the property of others—power, therefore, arbitrarily exerted, imposing a burden without a compensating advantage of any kind.'"

THE QUESTIONS ARE SUBSTANTIAL

The majority opinion of the Supreme Court of South Carolina holds that the Special Act and its application are valid under the due process of law and equal protection of the laws provisions of the Constitution of the United States.

1. The holding denies to Appellants and all others similarly situated in South Carolina the Constitution of the United States guarantees of due process of law and equal protection of the laws.

2. It is in direct conflict with the holdings of the Supreme Court of the United States in *Myles Salt Co. v. Board of Commissioners,* 239 U. S. 478, 60 L. Ed. 392, *Kansas City Southern Railroad Company v. Road Improvement District No. 6,* 256 U. S. 658, 65 L. Ed. 1151, and *Nashville, C. & St. L. R. Co. v. Walters,* 294 U. S. 405, 79 L. Ed. 949.

"It is to be remembered that a drainage district has the special purpose of the improvement of particular property, and when it is so formed to include property which is not and cannot be benefited directly or indirectly, including it only that it may pay for the benefit to other property, there is an abuse of power and an act of confiscation. *Phillip Wagner v. Leser, supra.* We are not dealing with motives alone, but as well with their resultant action; we are not dealing with disputable grounds of discretion or disputable degrees of benefit, but with an exercise of power determined by considerations not of the improvement of plaintiff's property, but solely of the improvement of the property of others—power, therefore, arbitrarily exerted, imposing a burden without a compensating advantage of any kind." *Myles Salt Co. v. Board of Commissioners,* 239 U. S. 478, 485, 60 L. Ed. 392, 396.

"If, however, the statute providing for the tax is 'of such a character that there is no reasonable presumption that substantial justice generally will be done, but the prob-

ability is that the parties will be taxed disproportionately to each other and to the benefit conferred, the law cannot stand against the complaint of one so taxed in fact.' *Gast Realty & Invest. Co. v. Schneider Granite Co., supra.*" *Kansas City Southern Railroad Company v. Road Improvement District No. 6,* 256 U. S. 658, 660, 65 L. Ed. 1151, 1156.

"While moneys raised by general taxation may constitutionally be applied to purposes from which the individual taxed may receive no benefit, and indeed, suffer serious detriment; *St. Louis & S. W. R. Co. v. Nattin,* 277 U. S. 157, 159, 72 L. Ed. 830, 831, 48 S. Ct. 438; *Memphis & C. R. Co. v. Pace,* 282 U. S. 241, 246, 75 L. Ed. 315, 320, 51 S. Ct. 108, 72 A. L. R. 1096; so-called assessments for public improvements laid upon particular property owners are ordinarily constitutional only if based on benefits received by them. *Myles Salt Co. v. Iberia & St. M. Drainage Dist.,* 239 U. S. 478, 60 L. Ed. 392, 36 S. Ct. 204, L. R. A. 1918E, 190; *Gast Realty & Invest. Co. v. Schneider Granite Co.,* 240 U. S. 55, 60 L. Ed. 523, 36 S. Ct. 254; *Kansas City S. R. Co. v. Road Improv. Dist.,* 256 U. S. 658, 65 L. Ed. 1151, 41 S. Ct. 604." *Nashville, C. & St. L. R. Co. v. Walters,* 294 U. S. 405, 429, 79 L. Ed. 949, 963.

3. The Special Act discriminates against all freeholders, qualified electors and residents of the area comprising the Una Water District and denies to them those fundamental and basic rights accorded by the General Law to all other freeholders, qualified electors and residents of unincorporated areas of South Carolina.

4. Determination by the Supreme Court of the United States is of paramount importance to the preservation of the constitutional guarantees of due process and equal protection not only to persons in South Carolina but to persons in every State.

It is submitted that the denial of due process and the denial of equal protection must not be allowed to stand, that the question presented by this appeal is substantial and that the question is of public importance.

Respectfully submitted,

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